Supreme Court, U.S.
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(14) (13)

Nos. 99-603 and 99-960

In the Supreme Court of the United States

LEGAL SERVICES CORPORATION, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CARMEN VELAZQUEZ, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI IN NO. 99-603
FILED: OCT. 6, 1999
PETITION FOR WRIT OF CERTIORARI IN NO. 99-960
FILED: DEC. 6, 1999
CERTIORARI GRANTED: APR. 3, 2000

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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for writ of certiorari in *United States* v. *Velazquez*, No. 99-960:

District court order denying preliminary injunction (Dec. 22, 1997) 51a
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Docket No. 1-97cv182

VELAZQUEZ, ET AL.

v.

LEGAL SERVICES CORP., ET AL.

Docket Entries

DATE	DOCKET NUMBER	ENTRY
1/14/97	1	COMPLAINT filed and summon(es) issued for Legal Services Corp, Legal Services for FILING FEE $150.00 RECEIPT # 190973 (ac) [Entry date 01/17/97]
		* * * * *
1/27/97	4	Pltffs' AMENDED COMPLAINT, (Answer due 2/6/97 for Legal Services for New York City, for Legal Services Corp.) amending [1-1] complaint (dr) [Entry date 01/30/97]
		* * * * *

DATE	DOCKET NUMBER	ENTRY
3/14/97	24	USA's Notice of UNOPPOSED MOTION to intervene. (lg) [Entry date 04/16/97]
		* * * * *
3/20/97	11	ANSWER to Complaint by Legal Services Corp. (lg)
3/21/97	13	Pltffs' MOTION for class certification & a preliminary injunction. Motion hearing 3/24/97 at 10AM. (lg) [Entry date 3/26/97]
3/21/97	14	Declarations & Affidavits in support of pltffs' motion for class certification & preliminary injunction. (Declarations & Affidavits A thru M annexed). (lg) [Entry date 3/26/97]
		* * * * *

DATE	DOCKET NUMBER	ENTRY
3/21/97	17	Supplemental Affidavit & Declarations in support of pltffs' motion for class certification & preliminary injunction. (Affidavit & Declarations A thru D annexed). (lg) [Entry date 3/26/97]
		* * * * *
3/21/97	19	Declarations in support of defts' opposition to pltffs' motion for a preliminary injunction. (Declarations A & B & Exhibits 2, 3, 4 & 5 annexed). (lg) [Entry date 3/26/97]
		* * * * *
3/26/97	22	TRANSCRIPT of hearing before Judge Block filed for dates of 3/24/97. ESR Operator R. Eppenstein. (lg) [Entry date 03/27/97]

DATE	DOCKET NUMBER	ENTRY
4/22/97	27	LETTER dated 3/31/97 from Alan Levine to Judge Block, submitting this letter to request that the Court consider the following in connection with pltffs' motion for a preliminary injunction. (dr)
6/17/97	28	LETTER dated 5/22/97 from Alan Levine to Judge Block, advising the Court that, since oral argument in this matter LSC has made material changes to its regulations concerning "interrelated organizations", and "program integrity". (dr)
6/18/97	29	LETTER dated 5/29/97 from Jeffrey Markowitz to Judge Block, responding to the letter sent to the Court by Alan Levine, on behalf of deft LSC regarding promulgated regulations. (dr)

DATE	DOCKET NUMBER	ENTRY
7/30/97	32	LETTER dated 5/27/97 from E. Joshua Rosekranz to Judge Block, requesting that the Court should enjoin the restrictions on the use of non-LSC funds. (dr)
11/13/97	33	LETTER dated 9/22/97 from Peter M. Fishbein to Judge Block re: plaintiffs' motion for a preliminary injunction. Final new regulations have been approved and a proposed plan for creating an affiliate entity has been concretely rejected by LSC pursuant to 45:1610. (rg)
12/31/97	34	MEMORANDUM AND ORDER denying plaintiffs' [13-1] motion for preliminary injunctive relief, as plaintiffs have failed to establish a probability of success on the merits of their facial constitutional challenge. Signed by Judge Frederic Block on12/22/97. c/m (wa)

DATE	DOCKET NUMBER	ENTRY
1/12/98	35	NOTICE OF APPEAL by Carmen Velazquez, WEP Workers Together, Community Service, New York City Co., Centro Independiente, Greater N.Y. Labor-, Farmworkers Legal, Lucy A. Billings, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, Lauren Shapiro, C. Virginia Fields, Guillermo Linares, Stanley Michels, Adam Clayton Powell IV, Lawrence Seabrook, Scott M. Stringer. Fee Paid $ 105.00. Receipt # 202707 Notice of Appeal and certified copy of docket sent appealing [34-1] order. NOA served by the Clerk. Judge notified. C of A notified. (mcg) [Entry date 01/13/98]

* * * * *

DATE	DOCKET NUMBER	ENTRY
2/5/98	37	LETTER dated 6/5/97 from Peter M. Fishbein to Judge Block that Jeffrey S. Markowitz' letter of 5/29/97 misses the point of plaintiffs' objections to LSC's latest version of its regulations in such a way as to illuminate the unconstitutionality of taking the Title X regulations approved in Rust and applying them willy nilly in the context of legal services. (rg)
2/6/98	38	ORDER dated 1/20/98 that defendant is ordered to provide plaintiffs with information regarding those applications for funding that have been submitted since issuance of its "final regulations" on 5/21/97, said information to include the name and address of all applicants, the date of the application, the nature of the application, the action taken by the defendant in respect therto, and any stated rea-

DATE	DOCKET NUMBER	ENTRY
		sons for the denial of any such applications. Defendant shall provide plaintiffs' counsel with access to such document for inspection and copying, at plaintiffs' own expense. All other discovery shall be stayed pending a decision from the Court of Appeals for the Second Circuit from this Court's denial of plaintiff's motion for a preliminary injunction. C/M (signed by Judge Frederic Block) (rg)
2/11/98	39	(copy) LETTER dated 9/25/97 from Jeffrey Markowitz, Esq., to Judge Block, stating that nothing in the 9/22/97 letter of Peter M. Fishbein affects or alters the inquiry before the Court. (wa)

DATE	DOCKET NUMBER	ENTRY
2/11/98	40	(copy) LETTER dated 9/26/97 from Alan Levine, attorney for Legal Service Corp., to Judge Block, stating that no plaintiff has attempted to comply with the program integrity regulations and therefore the court should deny their request for a preliminary injunction. (wa)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 98-6006

VELAZQUEZ ET AL., PLAINTIFFS-APPELLANTS,

v.

LEGAL SERVICES CORP., DEFENDANT-APPELLEE,

v.

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE.

DOCKET ENTRIES

DATE	ENTRY
	* * * * *
1/15/98	Appellant's Carmen Velazquez et al. motion for injunction pending appeal or, in the alternative, expedited appeal FILED (w/pfs). [1110824-2] [Forwarded To AA] (ag42)
	* * * * *

DATE	ENTRY
2/3/98	Order FILED DENYING motion for injunction pending appeal and GRANTING motion to expedite appeal [1110824-2] by Appellant Carmen Velazquez, endorsed on motion form dated 1/15/98. "Denied As To An Injunction Pending Appeal And Granted As To An Expedited Appeal; Appellant Shall File A Brief And Appendix By February 17, 1998; Appellee Shall File A Brief by March 3, 1998; Appeal To Be Heard As Early As The Week Of March 16, 1998." [Per ALK, JMW] Judge Weinstein (EDNY) Recused Himself From Consideration Of This Matter. [FOR THE COURT:AH] (ag42)
	* * * * *
3/20/98	Case heard before JACOBS, LEVAL, GIBSON C.JJ. (TAPE: #183) (ca95)
	* * * * *

DATE	ENTRY
1/7/99	Judgment of the district court is AFFIRMED IN PART & REVERSED IN PART by published signed opinion filed. (PNL) [98-6006] (ag41)
1/7/99	Judge Jacobs DISSENTING in part in a separate opinion filed. (ag41)
1/7/99	Judgment filed. (ag41)
	* * * * *
7/8/99	Order FILED DENYING petition for REHEARING [1358922-1] & DENYING rehearing in banc [1358922-2] by Appellants Carmen Velazquez, Wep Workers Together, Community Service, NYC Coalition, Centro Independiente, Greater NY Labor, Farmworkers Legal, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, Lauren Shapiro, Andrew J. Connick, C. Virginia Fields, Guil-

DATE	ENTRY
	lermo Linares, Stanley Michels, Adam Clayton Powell Jr.IV, Lawrence Seabrook, M. Stringer, endorsed on motion dated 3/12/99., DENYING petition for REHEARING [1348987-1] & DENYING petition petition for rehearing in banc [1348987-2] by Appellee USA, endorsed on motion dated 2/26/99., DENYING petition for REHEARING [1349050-1] by Appellee Legal Services Corp. & DENYING petition petition for rehearing in banc [1349050-2] by Appellee Legal Services Corp., endorsed on motion dated 2/22/99. "A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Legal Services Corporation, Intervenor-Appellee United States of American and the appellants Carmen Velazquez et al. UPON consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED. It is further

DATE	ENTRY
	noted that a request for an en banc vote having been made by a judge of the panel that heard the appeal, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof, rehearing en banc is DENIED." [For the Court: RAA, Acting Operations Manager] (ag41)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 97 CV 00182 (FB)

[CASE CAPTION OMITTED]

AMENDED CLASS ACTION COMPLAINT

INTRODUCTORY STATEMENT

1. This is a civil action arising under Article III of the United States Constitution, and the First, Fifth, and Tenth Amendments thereto, challenging restrictions imposed by Pub. L. 104-134, 110 Stat. 1321, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, as reenacted by Pub. L. 104-208, 110 Stat. 3009, the Omnibus Consolidated Appropriations Act, 1997, on Legal Services attorneys seeking to provide effective legal representation to indigent clients. Pursuant to Pub. L. 104-208, attorneys employed by any entity receiving funds from defendant, LEGAL SERVICES CORPORATION ("LSC"), are unable to invoke many of the most powerful procedural tools generally available to other lawyers and their clients, to present certain substantive claims, or to represent certain classes of indigent clients who are in desperate need of legal assistance, even when such activities are funded wholly from non-federal sources. Among the restrictions challenged herein are the prohibitions against (1) participating in class actions on behalf of indigent clients; (2) challenging the constitutionality of certain welfare statutes; (3) challenging the legality of certain welfare regulations; (4) providing legal services to indigent, lawfully-admitted aliens; (5) seeking or accepting court-awarded attorneys' fees; (6) initiating participation in

legislative hearings or administrative rulemaking proceedings on behalf of indigent clients; (7) informing potential clients of their rights and offering to represent them, unless the potential client has affirmatively sought advice; and (8) providing legal services to incarcerated persons.

2. Plaintiffs allege that some, or all, of the restrictions imposed by Pub. L. 104-208: (1) abridge plaintiffs' freedoms of speech and association and the right to petition the government for redress of grievances in violation of the First Amendment; (2) deny indigent persons the equal protection of the laws in violation of the Fifth Amendment; and (3) ignore the principles of separation of powers and federalism in violation of Article III of the Constitution and the Tenth Amendment.

3. Defendants, acting under color of Pub. L. 104-208, have threatened to dismiss any attorney who provides legal services that are proscribed by Pub. L. 104-208, or to defund any program that permits an employee to engage in those proscribed practices, even when the services are funded exclusively by non-federal sources.

4. Upon information and belief, less than 50 percent of the funds received by Legal Services offices in New York City are provided by defendant LSC. More than one half the funds received by Legal Services offices in New York City are received from non-federal sources, including private donations and grants from state and local government agencies.

5. Upon information and belief, attorneys employed by entities that receive funding in whole or in part from defendant, LSC, ("Legal Services lawyers") representing indigent clients in over 630 class actions nationwide

have been forced to resign as class counsel, or have been forced to assume "non-adversary" monitoring status, pursuant to the command of Pub. L. 104-208. Since the enactment of Pub. L. 104-208, Legal Services lawyers have been forced to turn away numerous clients with meritorious claims, even though non-federal funds available to those lawyers would have paid for the representation.

JURISDICTION AND VENUE

6. Subject matter jurisdiction is conferred upon the Court by 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1391(e).

THE PARTIES

The Client Plaintiffs

7. Plaintiffs, CARMEN VELAZQUEZ, WEP WORKERS TOGETHER!, COMMUNITY SERVICE SOCIETY OF NEW YORK, INC., NEW YORK CITY COALITION TO END LEAD POISONING, CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, INC., and GREATER NEW YORK LABOR-RELIGION COALITION (occasionally referred to as the "client-plaintiffs"), are individuals, membership organizations, or nonprofit corporations that are represented by or have been represented by Legal Services lawyers, who have been injured by, and whose members have been injured by, the proscriptions of Pub. L. 104-208.

(a) Plaintiff, VELAZQUEZ, is an indigent individual and a welfare recipient who suffers from numerous severe and chronic medical ailments that impede her ability to work. Plaintiff, VELAZQUEZ, had been rep-

resented by a Legal Services lawyer in connection with a claim that, despite her efforts to comply with the City's Job Search program, New York City wrongfully penalized her welfare and Medicaid benefits for a period of three months in violation of federal and state law and state regulations. Pursuant to Pub. L. 104-208, plaintiff, VELAZQUEZ's, Legal Services lawyer was forced to resign from her representation of plaintiff, VELAZQUEZ, in this matter, because her claim challenged the legality of a welfare regulation. Efforts to obtain substitute counsel have failed, leaving plaintiff, VELAZQUEZ, without representation in her currently pending action.

(b) Plaintiff, WEP WORKERS TOGETHER! ("WEP WORKERS"), is a membership organization with offices in Brooklyn, New York, of welfare recipients residing in all five boroughs of New York City who are employed in "workfare" programs. Plaintiff, WEP WORKERS, is devoted to advancing the legal rights of its members through advocacy, organizing, and litigation. Plaintiff, WEP WORKERS, and its members have relied heavily on Legal Services lawyers in the past to advance their positions in courts and before state and local legislative and administrative bodies. Plaintiff, WEP WORKERS, cannot secure adequate legal representation because of the proscriptions of Pub. L. 104-208. For example, because of the proscriptions of Pub. L. 104-208, plaintiff, WEP WORKERS, and its members, may not be represented by a Legal Services lawyer before legislative and administrative bodies in New York State that are currently considering how to draft or implement the recent sweeping changes to the nation's welfare laws and regulations, except at the request of such bodies. Similarly, plaintiff, WEP WORK-

ERS, and its members cannot turn to Legal Services lawyers to challenge the constitutionality of certain federal or state welfare reforms that appear vulnerable to constitutional attack.

(c) Plaintiff, COMMUNITY SERVICE SOCIETY OF NEW YORK, INC. ("CSS"), is a New York not-for-profit corporation that works cooperatively with community based organizations and other social policy and advocacy groups in all five boroughs of New York City to fight poverty through research and advocacy, community development, community organizing, litigation, and direct service Since its founding in the 1840s, plaintiff, CSS, has advocated for the health and welfare of New York City's poor residents. Through its activities, CSS has promoted and increased affordable housing stock for poor and homeless families in New York City and has been a strong voice for accessible health care, educational equity, full political participation for the poor, and fair, responsible welfare policies. For decades plaintiff, CSS, has worked closely with Legal Services offices in class action litigation, and has served as co-counsel in at least one case with MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LEGAL SERVICES FOR NEW YORK CITY, INC. ("LSNY"), and from non-federal sources. The current litigation work of plaintiff, CSS, depends on joint collaboration with Legal Services entities, including collaboration in class actions and in cases involving claims for attorneys' fees. Because of the proscriptions of Pub. L. 104-208, the ability of plaintiff, CSS, to collaborate with Legal Services entities and advocate on behalf of the poor through litigation has been greatly reduced.

(d) Plaintiff, NEW YORK CITY COALITION TO END LEAD POISONING ("NYCCELP"), is a membership organization founded in 1983 and composed primarily of parents, including low-income parents in all five boroughs of New York City, of children at risk of or suffering from lead poisoning. Plaintiff, NYCCELP, engages in education and advocacy on behalf of its members and their children. Plaintiff, NYCCELP, and its members have relied for legal assistance on entities that receive funding in part from defendant, LSC. Such legal assistance has included participation in class actions. Because of the proscriptions of Pub. L. 104-208, plaintiff, NYCCELP, its members, and their children, are no longer able to receive adequate legal representation from Legal Services lawyers employed by entities funded in part by defendant, LSC. For example, plaintiff, NYCCELP, is a plaintiff in an ongoing class action that seeks to force local and state officials to comply with federal, state, and local regulations involving lead poisoning prevention and treatment. Because of the proscriptions of Pub. L. 104-208, plaintiff, NYCCELP, has been deprived of the representation of its lead counsel, an employee of Bronx Legal Services, which has represented it in this class action for the past ten years.

(e) Plaintiff, CENTRO INDEPENDIENTE DE TRABAJADORES AGRICOLAS, INC., ("INDEPENDENT FARMWORKERS CENTER") is a not-for-profit corporation representing farmworkers in the Hudson Valley Region of New York State that engages in education and advocacy activities on behalf of its members. Plaintiff, INDEPENDENT FARMWORKERS CENTER, and its constituents, have relied on plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., for legal

representation before state legislative and regulatory bodies, and for representation in litigation. Because of the proscriptions of Pub. L. 104-208, plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., has foregone Legal Services funding. Plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., has informed plaintiff, INDEPENDENT FARMWORKERS CENTER, that it will no longer be able to provide the level of legal services that it had provided prior to the effective date of the proscriptions, because of reductions in funding caused by Pub. L. 104-208.

(f) Plaintiff, GREATER NEW YORK LABOR-RELIGION COALITION ("GNYLRC"), is a network of trade union and religious leaders throughout New York City concerned with human rights. Plaintiff, GNYLRC, engages in legal advocacy on behalf of its members, and has relied for legal assistance on entities that receive funding in part from defendant, LSC. Such legal assistance has included participation in class actions. Because of the proscriptions of Pub. L. 104-208, plaintiff, GNYLRC, and its members, now are unable to receive the full and adequate legal representation that they previously had received from entities funded in part by defendant, LSC.

The Lawyer Plaintiffs

8. Plaintiff, FARMWORKERS LEGAL SERVICES OF NEW YORK, INC. ("FARMWORKERS LEGAL SERVICES"), is a not-for-profit legal advocacy organization that represents indigent clients, specifically migrant and seasonal farm workers, in litigation and before legislative bodies and administrative agencies. Plaintiff, FARMWORKERS LEGAL SERVICES, appears frequently before administrative and legislative

bodies to ensure that farm workers are not excluded from protective legislation, such as unemployment insurance, overtime pay, and labor laws. Much of its work depends upon its ability to represent groups of workers, both citizens and aliens, and to reach out to workers in isolated rural labor camps without telephones, educate them about their legal rights and offer to represent them. Prior to 1996, plaintiff, FARMWORKERS LEGAL SERVICES, received funding from defendant, LSC, but about half of its funds were from non-federal sources. In 1996, plaintiff, FARMWORKERS LEGAL SERVICES, terminated its relationship with and ceased receiving funding from defendant, LSC, because of the proscriptions of Pub. L. 104-208. Plaintiff, FARMWORKERS LEGAL SERVICES, rejected about $212,000 in federal money and saw its 1996 budget decline from $582,000 to $350,000. It has been forced to close one of three offices due to the funding cuts and has sharply curtailed its legal work. Plaintiff, FARMWORKERS LEGAL SERVICES, wishes to receive funding from defendant, LSC, but cannot receive such funding while at the same time fulfilling its obligations to its non-federal donors and providing full and adequate representation to its clients, because of the proscriptions of Pub. L. 104-208.

9. Plaintiffs, LUCY A. BILLINGS, PEGGY EARISMAN, OLIVE KAREN STAMM, JEANETTE ZELHOF, ELISABETH BENJAMIN, JILL ANN BOSKEY, and LAUREN SHAPIRO (occasionally referred to as the "lawyer-plaintiffs"), are attorneys employed, or formerly employed, by not-for-profit legal services organizations that receive funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiffs, BILLINGS, EARISMAN, STAMM,

and ZELHOF, currently are employed by such organizations. Plaintiffs, BENJAMIN, BOSKEY, and SHAPIRO, are attorneys formerly employed by such organizations who left their employment at those organizations because the proscriptions of Pub. L. 104-208 made it impossible to continue to fully and adequately represent their clients. Because of the proscriptions of Pub. L. 104-208, plaintiffs, BENJAMIN, BOSKEY, and SHAPIRO, have suffered loss of pay or benefits, or other economic harm. Each contemplates the possibility of working for an organization that receives federal funds, but would not do so as long as the restrictions are in place.

(a) Plaintiff, BILLINGS, is an attorney employed since 1989 by Bronx Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, BILLINGS, has been a Legal Services lawyer for over 25 years. Prior to the effective date of the proscriptions imposed by Pub. L. 104-208, plaintiff, BILLINGS, represented indigent persons in class action litigation in the areas of housing, health, and child welfare, coordinated and supervised the representation of indigent clients before legislative and regulatory forums, and engaged in client outreach and communication to determine critical problem areas requiring legal advocacy on behalf of indigent persons. Because of the proscriptions of Pub. L. 104-208, plaintiff, BILLINGS, is unable to continue to fully and adequately represent her clients at Bronx Legal Services, and has been forced to discontinue participation in many of the above-described activities. In particular, she has been forced to withdraw as counsel in an ongoing class action that seeks to enforce federal, state, and local regulations involving lead

poisoning prevention and treatment, a case in which she has served as lead counsel for ten years. In addition, because of the proscriptions of Pub. L. 104-208, plaintiff, BILLINGS, has been forced to reject at least five additional potential class actions on behalf of indigent clients.

(b) Plaintiff, EARISMAN, is an attorney employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, EARISMAN, has worked on behalf of indigent clients for nearly 20 years. While at MFY Legal Services, plaintiff, EARISMAN, has represented indigent clients in individual and class actions regarding public housing issues, has sought attorneys' fees on behalf of her clients, and has appeared before Congress, state legislatures, and local government bodies on behalf of her clients. Because of the proscriptions of Pub. L. 104-208, plaintiff, EARISMAN, has been unable to bring as class actions several current lawsuits against New York City Housing Authority, has been unable to appear before government bodies on behalf of her clients, has been unable to seek attorneys' fees on behalf of her clients, and has been forced to decline representation of aliens in any type of case. In addition, plaintiff, EARISMAN, was required by Pub. L. 104-208 in at least one instance to temporarily decline representation of a client in a long-standing housing dispute, because the client was incarcerated in an unrelated matter.

(c) Plaintiff, STAMM, is an attorney employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Before the restrictions of

Pub. L. 104-208 went into effect, plaintiff, STAMM, sought attorneys fees' on behalf of her indigent clients in numerous cases involving single room occupancy housing, and appeared before legislative and administrative bodies on behalf of her clients. Because of the proscriptions of Pub. L. 104-208, plaintiff, STAMM, is unable to seek attorneys' fees on behalf of her clients, is unable to appear before certain legislative and administrative bodies on behalf of her clients, except at the request of those bodies, and therefore is no longer able to fully and adequately represent her clients.

(d) Plaintiff, ZELHOF, is an attorney employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, ZELHOF, has worked at MFY Legal Services for nearly 10 years, and is now a Supervising Attorney at that organization. The specific project in which plaintiff, ZELHOF, works at MFY Legal Services receives absolutely no funding from defendant, LSC. Prior to the effective date of the proscriptions imposed by Pub. L. 104-208, plaintiff, ZELHOF, represented psychiatrically disabled clients in class action and other litigation, including class actions against adult home operators who wrongfully withheld personal needs allowance from her clients. In addition, plaintiff, ZELHOF, sometimes sought attorneys' fees on behalf of her clients. Because of the proscriptions of Pub. L. 104-208, plaintiff, ZELHOF, no longer is able to bring such class actions, or to seek attorneys' fees, on behalf of her clients, and therefore is unable to fully and adequately represent her clients.

(e) Plaintiff, BENJAMIN, is an attorney who, from 1992 to 1996, was employed by Bronx Legal Services,

an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. While employed by Bronx Legal Services, plaintiff, BENJAMIN, represented indigent clients in individual and class actions challenging the legality of New York State welfare laws and regulations. She also participated in a variety of class action suits involving civil rights and disability law and lobbied federal, state and local officials. For example, plaintiff, BENJAMIN, served as project coordinator for the New York City Task Force on Medicaid Managed Care, an organization of 200 members engaging in lobbying on behalf of indigent persons before local, state, and federal government agencies and officials. These activities were supported in substantial part by non-federal funding, including $80,000 of funding from sources other than defendant, LSC. Because of the proscriptions of Pub. L. 104-208, plaintiff, BENJAMIN, was unable to fully and adequately represent her clients at Bronx Legal Services, and was forced in 1996 to end her employment at that organization in order to continue representing her clients and working in her area of expertise, welfare and Medicaid law. She has since moved to another employer, losing her seniority, where she engages in the practice she had developed at Bronx Legal Services.

(f) Plaintiff, BOSKEY, is an attorney formerly employed by MFY Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, BOSKEY, has been a Legal Services lawyer since shortly after graduating from law school in 1986. In 1989 she was elevated to the position of Managing Attorney of MFY Legal Services' SSI/SSD Project. Since 1993, she also had supervised a project funded by the Social Se-

curity Administration to locate and assist persons interested in filing applications for Supplemental Security Income. Before the proscriptions of Pub. L. 104-208 went into effect, plaintiff, BOSKEY, represented indigent and sometimes incarcerated clients in litigation involving welfare benefits, including litigation challenging the legality and constitutionality of welfare statutes and regulations, and had represented alien persons lawfully residing in the United States. Plaintiff, BOSKEY, also had served as counsel in four class actions, had brought individual actions challenging welfare laws, and commented on proposed regulations on behalf of indigent clients, and had regularly sought and obtained attorneys' fees for appeals to the federal courts. Her work was fully funded by grants from New York City, New York State, the Social Security Administration, and statutory attorneys' fees. None of her legal work has ever been funded by monies from defendant, LSC. Her caseload brought in between $40,000 and $150,000 per year in attorneys' fees alone. Because of the proscriptions of Pub. L. 104-208, plaintiff, BOSKEY, was unable to engage in many of the above-described legal advocacy activities while employed at MFY Legal Services. After the proscriptions of Pub. L. 104-208 went into effect, plaintiff, BOSKEY, was forced to reduce her work hours at MFY Legal Services to four days a week in order to fully and adequately represent her clients in pending litigation, lobbying needs, educating clients of their rights and offering to represent them, and other activities prohibited to Legal Services lawyers. Ultimately, she left her employment at MFY Legal Services in order to continue to fully and adequately represent her clients. Plaintiff, BOSKEY, suffered economic injury by being forced to reduce and then end her employment at MFY

Legal Services and to establish a not-for-profit legal advocacy organization, the Center for Disability Advocacy Rights, in order to continue to fully and adequately represent her clients.

(g) Plaintiff, SHAPIRO, is an attorney employed from 1986 until September, 1996, by South Brooklyn Legal Services, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. From December, 1989, until September, 1996, plaintiff, SHAPIRO, acted as director of the HIV Unit at South Brooklyn Legal Services. The salaries of the HIV Unit's staff members were provided for in their entirety by funding raised by plaintiff, SHAPIRO, from sources other than defendant, LSC. Before the proscriptions of Pub. L. 104-208 went into effect, plaintiff, SHAPIRO, represented HIV-positive clients both in class action litigation involving welfare laws and regulations, and before legislative and administrative bodies. As a result of the proscriptions of Pub. L. 104-208, plaintiff, SHAPIRO, was forced to withdraw from two lawsuits regarding government benefits, one involving access of HIV-positive persons to emergency benefits and the other involving poverty law. She was forced to leave her employment at South Brooklyn Legal Services in order to continue to work on welfare reform issues on behalf of her indigent clients. In addition, as a result of the proscriptions of Pub. L. 104-208, plaintiff, SHAPIRO, was forced to withdraw as counsel in two pending actions involving government benefits issues.

The Donor Plaintiffs

10. Plaintiffs, ANDREW J. CONNICK, COUNCILMEMBER C. VIRGINIA FIELDS, COUNCILMEMBER

GUILLERMO LINARES, COUNCILMEMBER STANLEY MICHELS, COUNCILMEMBER ADAM CLAYTON POWELL, IV, SENATOR LAWRENCE SEABROOK, and ASSEMBLYMAN SCOTT M. STRINGER (occasionally referred to as the "donor-plaintiffs"), are individuals who have provided public or private non-federal funding to entities that also receive funds from the defendant, LSC, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208.

(a) Plaintiff, CONNICK, is an individual who has donated money to Legal Services for the Elderly, an entity that receives funding from defendant, LSC, through defendant, LSNY, and from non-federal sources. Plaintiff, CONNICK, intended that the money he donated be used by Legal Services for the Elderly to provide representation for indigent clients in individual and class actions, including actions challenging the constitutionality of welfare statutes and the legality of welfare regulations, and to engage in other conduct proscribed by Pub. L. 104-208. Because of the proscriptions of Pub. L. 104-208, the funds donated by plaintiff, CONNICK, to Legal Services for the Elderly cannot be used for the purposes and to the full extent that they were intended.

(b) Plaintiff, FIELDS, is a New York City Councilmember representing Council District 9 in New York County, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive

funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(c) Plaintiff, LINARES, is a New York City Councilmember representing Council District 10 in New York County, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(d) Plaintiff, MICHELS, is a New York City Councilmember representing Council District 7 in New York County, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(e) Plaintiff, POWELL, is a New York City Councilmember representing Council District 8 in New York and Bronx Counties, who has voted to appropriate City funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York City Council and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(f) Plaintiff, SEABROOK, is a New York State Senator representing Senatorial District 33 in Bronx

County, who has voted to appropriate State funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York State Legislature and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

(g) Plaintiff, STRINGER, is a member of the New York State Assembly representing Assembly District 67 in New York County, who has voted to appropriate State funds for the support of entities that receive funding in part from the defendant, LSC. Because of the proscriptions of Pub. L. 104-208, the funds appropriated by the New York State Legislature and given to entities that receive funding from defendant, LSC, cannot be used for the purposes and to the full extent that they were intended.

The Defendants

11. Defendant, LSC, is a Congressionally-created nonprofit corporation established in 1974, authorized to do business in New York, whose directors are nominated by the President and confirmed by the Senate, charged with responsibility for providing legal services to indigent clients in civil cases. Upon information and belief, all funds provided to LSC are authorized and appropriated by Congress. During fiscal year 1996, LSC received two hundred eighty million dollars ($280,000,000). Defendant, LSC, expends millions of dollars per year in New York State by funding legal services entities directly and through defendant, LSNY. As part of its statutory mandate, LSC is responsible for distributing funds appropriated by

Congress "to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. § 2996e(a)(1)(A). LSC also is responsible for interpreting and enforcing any restrictions attached to those funds by Congress, including the restrictions on the use of non-LSC funds challenged in this case.

12. Defendant, LSNY, is a New York nonprofit corporation authorized by the First Department, Appellate Division, to practice law in the State of New York. LSNY serves as the umbrella organization for the receipt of LSC funds in the City of New York, and distributes $10 million of LSC funds in the City of New York per year to eleven Legal Services entities who employ lawyers to provide legal representation to indigent clients. Upon information and belief, all actions by LSNY relevant to this proceeding were taken in response to a threat by defendant, LSC, to terminate the funding of all or a part of the Legal Services program in the City of New York if attorneys employed by Legal Services offices in the City of New York continued to participate in class actions or to engage in other legal advocacy activities proscribed by Pub. L. 104-208. Upon further information and belief, defendant, LSNY, is acting in connection with all claims hereunder, as the agent, and under the direction and control of, defendant, LSC.

CLASS ACTION ALLEGATIONS

13. (a) Plaintiff, VELAZQUEZ, brings this action on behalf of herself, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated individuals; namely, indigent individuals who are, or wish to be, represented by lawyers employed by entities receiving funds from LSC, and

who wish to assert legal claims as members of a class, to challenge the constitutionality or legality of welfare statutes or regulations, to be represented before legislative bodies and administrative agencies, or to assert some other legal claims proscribed by Pub. L. 104-208.

(b) The client-plaintiffs (other than plaintiff, VELAZQUEZ), bring this action in their respective individual capacities, on behalf of their respective members and constituencies, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated organizations and their members and constituencies; namely, indigent individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from LSC, and who wish to assert legal claims as members of a class, to challenge the constitutionality or legality of welfare statutes or regulations, to be represented before legislative bodies and administrative agencies, or to assert some other legal claim proscribed by Pub. L. 104-208.

14. FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., brings this action in its individual capacity, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated organizations; namely, organizations who wish to be eligible to receive funds from LSC, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208.

15. The lawyer-plaintiffs bring this action in their individual capacities, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving

funds from defendant, LSC, who wish to be free to represent indigent individuals in class actions, to challenge welfare statutes and regulations on behalf of indigents clients, to appear before legislative bodies and at administrative rulemaking proceedings on behalf of indigent clients, to seek and collect attorneys' fees on behalf of indigent clients, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208.

16. The donor-plaintiffs bring this action in their individual capacities, and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from LSC, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208.

17. The persons and organizations described in paragraphs 13-16 are too numerous to be joined individually. The claims of the named plaintiffs in paragraphs 13-16 are typical of the claims of the classes, since common questions of law and fact are raised in each claim. The named plaintiffs in paragraphs 13-16 are fully qualified to represent the interests of the absent members of the respective classes. Defendants have acted on grounds generally applicable to all members of each class, thereby making appropriate final injunctive relief and declaratory relief with respect to each class as a whole.

FACTS

18. On April 26, 1996, President Clinton signed Pub. L. 104-134, an omnibus continuing budget resolution providing funds for the 1996 fiscal year. Pub. L. 104-134 imposed substantial restrictions on the freedom of attorneys employed by entities receiving funds from LSC to provide legal representation to indigent clients, including the ability to participate in class actions on behalf of their indigent clients; to challenge the constitutionality of certain welfare statutes; to challenge the legality of certain welfare regulations; to provide legal services to indigent, lawfully-admitted aliens; to accept court-awarded attorneys' fees; to participate in legislative hearings, or administrative rule-making proceedings, on behalf of indigent clients; to inform potential clients of their rights and offer to represent them, unless the potential client has affirmatively sought advice; or to represent incarcerated persons. Pub. L. 104-134 proscribed the foregoing activities even if they are wholly funded by non-federal and private sources. These proscriptions of Pub. L. 104-134 were reenacted in all relevant aspects on September 30, 1996, by section 502 of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208. The relevant provisions of Pub. L. 104-134 state:

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency; that attempts to influence any part of any adjudicatory

> proceeding of any Federal, State, or local agency . . . designed for the formulation or modification of any agency policy of general applicability and future effect; that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar [legislative] procedure; that attempts to influence . . . oversight proceedings of the [LSC] . . .; that initiates or participates in a class action suit; that provides legal assistance for or on behalf of [certain categories of] alien[s] . . .; that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity . . .; that claims . . . , or collects and retains, attorneys' fees pursuant to any Federal or State law . . .; that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison; that . . . participates in any . . . way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system . . .; that defends a person in a proceeding to evict the person from a public housing project if . . . the eviction proceeding is brought [because of charges of illegal drug activity]; [or that] accept[s] employment resulting from in-person unsolicited advice to . . . obtain counsel or take legal action. . . .

Pub. L. 104-134, § 504(a). The pertinent portions of Pub. L. 104-134 and Pub. L. 104-208 are annexed as Exhibit A.

19. Pub. L. 104-134, as reenacted by Pub. L. 104-208, also appears to forbid Legal Services "entities" from using their non-federal funds to engage in any pro-

scribed activity, including participation in class action litigation, challenges to certain welfare statutes and regulations, appearances before legislative bodies and at administrative rulemaking proceedings except at the request of the body or agency, and other proscribed conduct, on behalf of their clients. Section 504(d)(1) of Pub. L. 104-134 states:

> The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.

20. Defendant LSC has issued final rules implementing parts of Pub. L. 104-208, in addition to having issued interim rules implementing parts of Pub. L. 104-134. These regulations construe the proscriptions of Pub. L. 104-134 and Pub. L. 104-208 broadly. Among other things, the final rules make clear that the proscriptions apply almost in their entirety to the use of all non-federal and private funds that pass through Legal Services entities, and that the ban on "participation" in class actions is interpreted broadly to include filing an *amicus curiae* brief or representing individual plaintiffs in any case in which a class has been certified. 45 C.F.R. § 1610.3, 45 C.F.R. § 1617.2. Under the interim rules, Legal Services lawyers are barred from engaging in litigation challenging laws or regulations enacted as part of a reform of a state or federal welfare system, and may not even represent an individual client seeking relief from a welfare agency if the case involves a challenge to existing law. 45 C.F.R.

§ 1639.3, 45 C.F.R. § 1639.4. The interim rules interpret Pub. L. 104-134 to bar any contact with legislators on behalf of clients, and all participation in agency rule-making proceedings and adjudications intended to formulate or modify agency policy, except that non-federal funds may be used to respond to a written request from a government agency or official. 45 C.F.R. § 1612.3, 45 C.F.R. § 1612.6. Furthermore, under the interim rules, Legal Services lawyers may not represent certain aliens lawfully present in the United States. 45 C.F.R. § 1626.3 According to the interim rules, Legal Services lawyers may not represent incarcerated persons in civil matters, even where the incarcerated is based on arrest rather than actual conviction of a crime. 45 C.F.R. § 1637.3. According to the interim rules, Legal Services lawyers are restricted in their ability to advise potential clients of their rights and offer to represent them. 45 C.F.R. § 1638.3. The interim rules also make clear that Legal Services lawyers may not seek attorneys' fees or collect court-ordered attorneys' fees. 45 C.F.R. § 1642.3. Copies of the pertinent regulations issued pursuant to Pub. L. 104-134 and Pub. L. 104-208 by defendant, LSC, are annexed as Exhibit B.

21. In the short time that the proscriptions of Pub. L. 104-134 and Pub. L. 104-208 have been in effect, they have seriously impaired the constitutional rights of clients and potential clients of Legal Services offices, many of whom are indigent persons with no source of legal representation other than their local Legal Services office. Among the many effects of Pub. L. 104-134 and Pub. L. 104-208, for example:

(a) recipients of welfare have been unable to bring class actions or individual suits to challenge new welfare laws and regulations which affect them, or to be represented by an attorney before the legislative and regulatory bodies issuing new welfare laws and regulations except at the request of such bodies;

(b) indigent individuals have been unable to bring class actions to enforce Medicaid laws and regulations intended to insure early disease diagnosis and treatment in indigent children;

(c) residents of low-income housing have been unable to bring class actions to enforce federal, state, and local housing laws and regulations, including laws and regulations establishing housing quality standards, laws and regulations intended to protect children from lead poisoning, and other laws and regulations intended to protect the health and safety of such residents;

(d) residents of low-income housing have been unable to bring class actions to enforce federal laws mandating the provision of job training and job opportunities at HUD rehabilitation and building projects, or against their landlords' unfair and deceptive collection and business practices, including practices in violation of federal law;

(e) many indigent persons have been unable to bring even non-class actions through their local Legal Services offices to enforce housing laws and regulations, or other federal, state, and local laws and regulations, because of the inability of Legal Services lawyers to seek or collect attorneys' fees;

(f) many aliens lawfully present in the United States have been unable to secure legal representation to enforce labor laws intended to protect them, or to advocate on their behalf before legislative bodies and regulatory agencies that are considering laws and regulations affecting them; and

(g) many indigent persons have been unable to bring actions to enforce their legal rights and to protect their health and welfare, because Legal Services lawyers are forbidden to inform such persons of their legal rights and to offer to represent them, unless the potential client has affirmatively sought advice.

CAUSES OF ACTION RELATING
TO THE RESTRICTIONS ON THE USE OF
NON-FEDERAL FUNDS

22. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to represent the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, including participation in any class action, and by prohibiting lawyer-plaintiffs from informing potential clients of their rights and offering to represent them except when the potential client has affirmatively sought advice, impinges directly on plaintiffs' freedom of speech and freedom to associate with one another in pursuit of common objectives and, thus, violates the First Amendment to the Constitution of the United States.

23. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to represent the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, impinges directly on the

First and Tenth Amendment freedoms of non-federal donors to contribute funds to entities receiving support from LSC in order to assure that indigent persons receive adequate legal representation.

24. Pub. L. 104-208, by making it impossible for an indigent client represented by a Legal Services lawyer using non-federal funds to raise significant procedural and substantive arguments against unlawful governmental action, and by prohibiting Legal Services lawyers using non-federal funds from attempting to influence regulatory or legislative action on behalf of indigent clients, violates the right to petition the government for redress of grievances.

25. Pub. L. 104-208 denies indigent litigants the equal protection of the laws in violation of the Fifth Amendment, by denying indigent litigants represented by a Legal Services lawyer with non-federal funds the benefit of procedural techniques, such as the class action; substantive defenses, such as the unconstitutionality of welfare statutes; statutory rights, such as the right to seek and collect attorneys' fees in certain cases; and other rights, such as the right to petition government in an attempt to influence regulatory or legislative action, that are fully available to more affluent clients.

26. Pub. L. 104-208, by requiring Legal Services lawyers with non-federal funds to withdraw from pending legal proceedings, and/or to confine their representation of existing clients to "non-adversary", "passive" monitoring of existing class action decrees, violates the structural autonomy of the Article III courts, and the 10th Amendment autonomy of the state courts,

by directly interfering with the ongoing progress of pending cases.

27. Pub. L. 104-208, by placing restrictions on the ability of Legal Services lawyers to use non-federal funds to fully and adequately represent their indigent clients, interferes with the ability of state and local government donors to allocate funds toward the purposes they deem necessary, in violation of the Tenth Amendment.

28. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to utilize all lawful means to advance the best interests of their indigent clients, is inconsistent with the Canons of Ethics, and the Code of Professional Responsibility, as those provisions are codified in the enabling statutes of LSC.

29. Pub. L. 104-208, by forbidding the lawyer-plaintiffs from using non-federal funds to represent the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, imposes unconstitutional conditions on the receipt of federal funding; namely, a forced waiver of plaintiffs' First Amendment freedom to provide and receive untrammeled legal advice in the context of a traditional lawyer-client relationship, the freedom of association, and the right to petition government for redress of grievances; and plaintiffs' Fifth Amendment rights to equal protection of the laws.

CAUSE OF ACTION RELATING TO THE RESTRICTIONS ON THE USE OF FEDERAL FUNDS

30. Pub. L. 104-208, by forbidding the lawyer-plantiffs from representing the client-plaintiffs in connection with any activity proscribed by Pub. L. 104-208, when such representation is funded by federal sources, abridges plaintiffs' freedom to associate with one another, freedom of speech, freedom to petition the government for redress of grievances, and right to equal protection of the laws; violates the principles of separation of powers under Article III of the Constitution and the principles of federalism under the Tenth Amendment; imposes unconstitutional conditions on the receipt of federal funding; and is inconsistent with the Canons of Ethics and the Code of Professional Responsibility, as those provisions are codified in the enabling statutes of LSC.

31. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request the Court to:

(1) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving funds from LSC to participate in class actions, even when the participation is funded solely by non-federal sources, violate the First and Fifth Amendments to the Constitution of the United States, principles of separation of power inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(2) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving

funds from LSC from challenging certain welfare statutes and regulations, even when the conduct is funded solely by non-federal sources, violate the First and Fifth Amendments to the Constitution of the United States, principles of separation of powers inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(3) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving funds from LSC to appear before any legislative body or to participate in any administrative rule making proceeding except at the request of the body or agency, on behalf of an indigent client, even when the conduct is funded solely by non-federal sources, violate the First and Fifth Amendments to the United States Constitution, principles of separation of powers inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(4) declare that the provisions of Pub. L. 104-208 forbidding attorneys employed by any entity receiving funds from LSC to seek attorneys' fees on behalf of indigent clients, to represent lawfully admitted aliens or incarcerated persons, or to inform potential indigent clients of their rights and offer to represent them except when the potential client has affirmatively sought advice, even when the conduct is funded solely by non-federal sources, violate the First and Fifth Amendments to the United States Constitution, principles of separation of powers inherent in Article III, and principles of federalism inherent in the Tenth Amendment;

(5) grant appropriate preliminary, and final, equitable relief enjoining defendants, LSC and LSNY, from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using non-federal funds to participate in a class action, to challenge the constitutionality of welfare statutes, to challenging the legality of welfare regulations, to seek or accept attorneys' fees on behalf of indigent clients, to appear before any legislative body or to participate in any administrative rule making proceeding on behalf of an indigent client, except at the request of the body or agency, to represent lawfully admitted aliens or incarcerated persons, or to inform potential indigent clients of their rights and offer to represent them except when the potential client has affirmatively sought advice;

(6) declare that the provisions of Pub. L. 104-208 must be read in harmony with the enabling statute creating LSC requiring Legal Services lawyers to act in accordance with the Canons of Professional Ethics, and the Code of Professional Responsibility;

(7) declare that the proscriptions imposed by Pub. L. 104-208 on the use of LSC funds to participate in class actions, to challenge certain welfare statutes and regulations, to provide legal services to certain aliens, to seek or accept court-awarded attorneys' fees, to participate in legislative hearings or administrative rulemaking proceedings on behalf of indigent clients, to inform potential clients of their rights and offer to represent them except when the potential client has affirmatively sought advice, and to provide legal services to incarcerated persons, violate the First and Fifth Amendments to the Constitution of the United States,

and principles of separation of powers inherent in Article III;

(8) grant appropriate preliminary, and final, equitable relief enjoining defendants, LSC and LSNY, from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using federal funds to engage in conduct proscribed by Pub. L. 104-208; and

(9) grant such other and further relief as the Court shall deem proper, including the award of reasonable attorneys' fees.

Dated: New York, New York
January 27, 1997

THE BRENNAN CENTER FOR JUSTICE

By: /s/ BURT NEUBORNE
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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

Civil Action No. 97 CV 00182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

AGAINST

LEGAL SERVICES CORPORATION, ET AL.,
DEFENDANTS

NOTICE OF MOTION FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTION

To: Legal Services Corporation
750 1st Street N.E.
Washington, DC 20002

Legal Services for New York City, Inc.
350 Broadway
New York, NY 10013

PLEASE TAKE NOTICE that plaintiffs, pursuant to Federal Rules of Civil Procedure 23(c)(1) and 65, upon the accompanying declarations of Lucy A. Billings, Jill Ann Boskey, Juan Cartagena, Megan Charlop, Andrew J. Connick, Stanley E. Michels, Burt Neuborne, Adrian Ramirez, James Schmidt, Olive Karen Stamm, and Jeanette Zelhof, the accompanying affidavits of Peggy Earisman and Carmen Velazquez, and the exhibits thereto, and for the reasons set forth in the accompanying memorandum of law, will move this Court before the Honorable Frederic Block on February 14,

1997, at 10:00 a.m., or as soon thereafter as counsel can be heard, at Courtroom 15 of the Courthouse of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY, for an order:

(1) determining that, as demonstrated in plaintiffs' Amended Class Action Complaint, this action complies with the prerequisites of Rule 23(a) in that the classes are so numerous that joinder is impracticable, there are questions of law of fact common to all classes, the claims of the representative parties are typical of the claims of the classes, and the representative parties will fairly and adequately protect the interests of the classes; this action complies with the requirements of Rule 23(b)(2) in that the defendants have acted or refused to act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the classes as a whole; and this action therefore is maintainable as a class action under Rule 23(b)(2); and

(2) preliminary enjoining the defendants, Legal Services Corporation ("LSC") and Legal Services for New York City, Inc. ("LSNY"), their officers, agents and employees, and all those in concert or participation with them, from disciplining any person or entity, including but not limited to dismissal or termination or suspension of funding, for using non-federal funds to participate in a class action, to challenge the constitutionality of welfare statutes, to challenge the legality of welfare regulations or statutes, to seek or accept attorneys' fees on behalf of indigent clients, to appear before any legislative body or to participate in any administrative rulemaking proceeding on behalf of an indigent cli-

ent, to represent aliens or incarcerated persons, or to approach potential indigent clients to inform them of their rights and offer to represent them, until a final hearing and determination of the merits in the above-entitled action, and for such other and further relief as to this Court may seem just and proper.

Unless defendants are restrained and enjoined by order of this Court, plaintiffs will suffer immediate and irreparable injury, loss and damages in that their First, Fifth and Tenth Amendment rights are being violated, thousands of indigent clients' legal needs are not being met as Legal Services lawyers have been forced to turn away clients with meritorious claims, countless urgent lawsuits that cannot be brought are languishing and are in danger of being time barred or too late to be of value, and Legal Services lawyers in hundreds of ongoing class actions have been forced to resign as class counsel. Plaintiffs have no adequate remedy at law. The immediate and irreparable injuries faced by plaintiffs are more fully described and set forth in the Amended Class Action Complaint filed in this action, and the memorandum of law and accompanying declarations and affidavits, and exhibits thereto, submitted in support of this motion.

Dated: New York, New York

January 27, 1997

THE BRENNAN CENTER FOR JUSTICE

By: /s/ BURT NEUBORNE

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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97 CV 0182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

against

LEGAL SERVICES CORPORATION AND
LEGAL SERVICES FOR NEW YORK CITY, INC.,
DEFENDANTS

AFFIDAVIT OF CARMEN VELAZQUEZ

STATE OF NEW YORK)
) ss.:
BRONX COUNTY)

CARMEN VELAZQUEZ, being duly sworn, deposes and says:

1. I am a class plaintiff in the above-referenced lawsuit. I submit this affidavit in support of plaintiffs' application for a preliminary injunction to prohibit defendants LEGAL SERVICES CORPORATION ("LSC") and LEGAL SERVICES FOR NEW YORK CITY, INC. ("LSNY") from enforcing unconstitutional restrictions, specifically those proscribing the use of non-federal funds, by Legal Services entities. Unless indicated otherwise, I base this affidavit upon personal knowledge.

2. I am a 56 year-old grandmother in the South Bronx. I came to the United States in 1973 from Ecuador. I am proud to say that I became a United States citizen a year ago. I always thought of the United States as a land of opportunity, a land where you could make something of yourself and your family. I thought of the United States as a place where people, especially the poor, were treated fairly.

3. From the time I arrived in the United States with my children I worked hard to support them. In the late 1980s, I was stricken with several serious medical conditions that made it impossible for me to work. For example, I developed severe allergies to many common chemicals, such as soaps and detergents, that I worked with. I had to stop working and rely on public assistance.

4. The welfare payments I had been receiving—$348 per month—are not even enough to cover my rent, so my family helps to make up the difference. I rely on food stamps to feed myself. Medicaid covers the prescriptions that are necessary for me to maintain my health.

5. Late in 1995, I received a letter informing me that I was required to participate in the City's Job Search program. The letter set an appointment. Because I knew that I would not be able to keep the appointment, I had a neighbor telephone the agency and ask whether I could reschedule. My neighbor was told that rescheduling would not be a problem. She was told that I would get a new notice with a new appointment.

6. Instead, I received a notice that I was required to appear before a judge at a Fair Hearing. I went by

myself, with no lawyer. No one explained to me what was happening. I never had an opportunity to talk to anyone about the medical conditions that preclude me from working. I was simply told that a decision would be made soon and I would find out about it in the mail.

7. In February 7, 1996, I went to the drug store to fill a prescription that was necessary to my health. The druggist told me that my Medicaid coverage had been terminated. That was the first that I heard of the Fair Hearing Decision to sanction me for three months for refusing to participate in the jobs program.

8. Those three months—the months of February, March, and April of 1996—were horrible for me. I could not pay my rent. I could not buy food. I could not even fill the prescriptions that my doctor ordered me to take. The City paid my rent, but I have to repay the loan; to this day, the City reduces my payments by $30 per month. This seemed wrong. I could not believe that my lifeline could be cut without ever giving me a chance to tell someone about my medical condition.

9. I could not afford a lawyer, but I learned from a social worker that Legal Services lawyers could help me. I visited the Legal Services office in the Bronx and I met with Elisabeth Benjamin. Ms. Benjamin listened to my case, told me about my rights, and agreed to represent me. I did not understand all the legal arguments that she was going to make, but I now understand that she was arguing that a portion of the state law that cut off my benefits violates a federal law. What I did understand for as long as Ms. Benjamin handled my case was that she was going to fight her hardest to make sure that my rights were protected. I felt comfortable with her. I saw her several times over

the next few months. Ms. Benjamin fought for me in court and I was pleased with how she handled my case.

10. After the case was sent to the appeals court, I learned that Ms. Benjamin and Bronx Legal Services had to abandon my case. I understand that they were required by a federal law to stop fighting my case because my case involves a challenge to a welfare law, and Legal Services lawyers, like Ms. Benjamin, are not allowed to make those arguments. I am also told that Bronx Legal Services was not allowed to handle my case even though they had money from places other than the federal government.

11. I understand that my case must be transferred to an appeals court and a brief must be filed by January 29, 1997. I cannot file my appeal without a lawyer.

12. I feel personally offended that our government in this land of opportunity would pass a law that tells my lawyer that she is not permitted to do everything she can to protect my rights. I do not understand how the government can give me a really good lawyer and slap her down as soon as she starts making arguments that could help me. I feel like the law discriminates against me because a lawyer who is paid would be permitted to make any argument for his client.

14. I understand that Bronx Legal Services has asked at least six lawyers to take my case. None of them is able or willing to do it. I will probably not be able to take the appeal that I have a right to take.

15. I hope I will never face the problem that I faced last spring. But my medical condition has not changed and I am worried that my benefits will be cut off again,

with no opportunity to explain the difficulties of my medical condition. If I do face this or other legal problems, I will surely call Bronx Legal Services, for I have great confidence in their legal skills. I worry that they will not be allowed to represent me at all or that they will not be allowed to represent me as well as they can, if I do have other legal problems.

16. My native language is Spanish. I have had my son, Frank Villavicencio, who is bi-lingual, look over this affidavit and translate it for me before I signed it.

/s/ CARMEN VELAZQUEZ
CARMEN VELAZQUEZ

Sworn to before me
this 22 day of January, 1997

[illegible signature]
Notary Public

JAYSON LUTZKY
NOTARY PUBLIC STATE OF NEW YORK
No. 31-4795700
Qualified in Westchester County
Commission Expires August 31, 1997

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

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97 CV 00182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

against

LEGAL SERVICES CORPORATION, ET AL.,
DEFENDANTS

DECLARATION OF JOHN A. TULL

I, John A. Tull, declare as follows:

Professional Background

I. I am currently the Director of the Office of Program Operations (OPO) of the Legal Services Corporation ("LSC"). I have been the Director of OPO and its predecessor organizations within LSC since January 1994. During a part of this time, I was also Acting Director of the Office of Program Services. I previously worked for LSC from March 1980 through December 1984 as Regional Counsel of the Denver Regional Office of the Office of Field Services. Before joining the Legal Services Corporation, I was a Reginald Heber Smith Fellow for two years with the Legal Aid Society of the Pima County Bar Association, and then continued as a staff attorney for several years. That organization was renamed Southern Arizona Legal Aid, and I was its Executive Director for approximately six years. Between 1984 and 1993, I did

private consulting work with legal services programs, IOLTA funders, bar associations (including the American Bar Association) and others involved in the delivery of legal services to the poor. During my career, I have served as the Reporter to the American Bar Association and its Standing Committee on Legal Aid and Indigent Defendants in the development of the Standards for Providers of Civil Legal Services to the Poor (adopted in 1986), and the Standards for the Monitoring and Evaluation of Providers of Legal Services to the Poor (adopted in 1991).

2. The primary duties and responsibilities of OPO are: (a) to ensure that grant funds are awarded pursuant to a system of competition and in a manner that promotes the efficient and effective delivery of legal services to eligible clients; and (b) to enforce the statutory and regulatory provisions governing LSC grantees.

Transition to New Program Requirements

3. My duties include oversight responsibility for the implementation by LSC recipients of the changes required by the interim and final regulations issued by LSC in 1996. One of the most difficult and complicated transition issues for many recipients concerned the timely disposition of pending cases involving matters which could no longer be handled by LSC recipients. In particular, under the new rules, recipients could no longer be involved in any class action suits or represent certain ineligible aliens or prisoners. Recipients were required by the law to dispose of or otherwise disengage themselves from all such pending restricted matters by August 1, 1996.

4. Between enactment of the 1996 appropriations and the August 1, 1996 implementation deadline, recipients had a transition period of approximately 90 days in which to dispose of their pending caseload involving class actions, ineligible aliens or prisoners. During the transition period, many cases were settled or otherwise terminated. Where cases could not be terminated, the recipient was required either to locate and arrange for the referral of the matter to another appropriate service provider, or to transfer the case to substitute counsel. Recipients were obligated to close or transfer their open matters in a manner consistent with their professional responsibilities to their clients.

5. During this transition period, recipients nationwide reported that they had completed or otherwise disposed of 630 class action cases, 428 matters involving prisoners, and 2,991 matters involving ineligible aliens. In connection with this withdrawal, the Executive Directors of recipients were required to submit certifications that their program was able to dispose of all of its pending restricted cases and was in compliance with the statutory prohibitions concerning class action suits, ineligible aliens, and prisoner litigation on or about August 1, 1996. As a rule, I understand that recipients nationwide were able to complete their withdrawals in such a manner so as to safeguard the interests of the affected clients. Annexed as Exhibit 1 hereto are reports received from legal service providers that receive LSC funds through Legal Services of New York, certifying their compliance status on or about August 1, 1996.

6. Arranging for the withdrawal from and the transfer of on going matters and cases to other counsel

took several months to complete. It is simply not possible to undo these arrangements at this time. Many of these matters have been resolved—by settlement or otherwise—in such a way as to preclude the reopening of these cases now. As to ongoing cases, in my opinion, attempting to return these matters to the LSC grantees would create confusion and uncertainty that intrudes on the attorney-client relationships that have developed in the six months since the transfers occurred.

7. The only plaintiff that was a recipient prior to August 1, 1996, Farmworkers Legal Services of New York ("FLSNY"), decided that it would discontinue receiving LSC funds as of July 1, 1996. A letter from FLSNY to LSC, dated June 12, 1996, is annexed hereto as Exhibit 2. The funds which had previously been granted to FLSNY to provide legal representation to aliens have been distributed to another legal aid provider. Under LSC's funding cycle, the next round of funding decisions will not take place until November 1997, for the grant year beginning January 1998. Therefore, if the court grants the preliminary injunction and FLSNY were to seek to resume receiving funds, it would have to compete with other eligible organizations with no guarantee that it would prevail in the competition. If FLSNY were selected to receive LSC funds, it would not receive them until January of the 1998 grant year.

8. No plaintiff in this case is a recipient currently operating under the recently enacted restrictions.

LSC's Policy Regarding Interrelated Organizations

9. In the course of my duties, I have become familiar with, and have oversight responsibility for, application of LSC's interrelated organization policy. An interim rule regarding interrelated organizations has been published in the Federal Register today, March 14, 1997. The rule is effective immediately. A copy of the rule, as published in the Federal Register, is annexed hereto as Exhibit 3.

10. The purpose of the new rule is to allow a recipient entity to exercise its constitutional rights to the fullest extent through separate organizations with which the recipient has an affiliation or relationship. Specifically, the new rule permits recipients to have an affiliation or relationship with separate organizations that may engage in prohibited activities funded solely with non-LSC funds, provided certain standards for program integrity are met. Thus, the new rule permits a recipient to control another organization, without the latter being subject to the federal restrictions that govern the use of LSC funds, as long as there is a wall of separation between the recipient and the other organization so that LSC funds will not be used to subsidize prohibited activities.

11. The new rule has two parts: a test of interrelatedness based on a determination of "control" (§ 1610.8(a)), and a test of "program integrity" (§ 1610.8(b)). The determination of control is fact-intensive and can be made only considering the totality of circumstances concerning the relationships between the organizations. Relevant factors include the extent to which the organizations share directors, officers, and

managers; the nature of contractual and financial relationships; and the history of the relationships and identity of interests among the organizations. Only one of these factors is dispositive, by itself; if the governing body of one organization includes enough officers and directors of the other to cause or prevent action by the other, then the entities will be deemed to be in a "control" relationship. § 1610.8(a)(3).

12. Even if a recipient and a non-recipient are found to be in a "control" relationship, the non-recipient will still not be subject to the federal restrictions as long as the standards for program integrity are met. Program integrity requires that: (1) the non-recipient receives no LSC funds, and LSC funds do not directly or indirectly subsidize restricted activities; (2) the relationship with the non-recipient is approved by the recipient's governing body; and (3) the recipient is physically and financially separate from the non-recipient. The determination of physical and financial separation is based on factors that I understand the Supreme Court approved in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), with respect to the regulations construed therein. These factors include the existence of separate personnel, facilities, accounting and timekeeping records, and the extent to which signs and other forms of identification distinguish the recipient from the non-recipient.

13. Under the new rule, a recipient may use non-LSC funds as "seed money" to establish an affiliated or related non-recipient organization to engage in prohibited activities, as long as the two organizations are not found to be in a "control" relationship, or, if they are in a "control" relationship, so long as the "program integrity" standards are satisfied. In addition, a recipient

may employ part-time non-managerial staff who also work part-time for an independent unsubsidized entity, without the latter being subject to the federal restrictions, so long as the two organizations are not found to be in a "control" relationship.

LSC's Previous Interrelated Organizations Policy

14. LSC's previous policy governing interrelated organizations was formally adopted in the 1986 LSC Audit and Accounting Guide, in Section 1-7. The relevant provisions were incorporated verbatim in my December 11, 1995 letter to all LSC grantee program directors, a copy of which is attached hereto as Exhibit 4.

15. LSC's previous policy was virtually identical to the first prong of the new rule, that is, so long as a recipient and an independent unsubsidized organization were not in a "control" relationship, and the recipient did not transfer funds to the unsubsidized organization, the latter could engage in prohibited activities. The determination of control was based on the same analysis discussed above. The only difference was that the previous policy did not explicity provide that under certain circumstances, the overlap of officers and directors could be a dispositive factor.

16. LSC also previously had a regulation concerning the transfer of funds from a recipient to a non-recipient. A copy of this regulation was attached to one of the declarations submitted by plaintiffs on this motion. *See* Neuborne Dec. Ex. 2 (45 C.F.R. § 1610.7). Under this previous regulation, if the transferred funds derived from LSC, then the entity that received the funds was subject to the same federal restrictions as if it were

directly funded by LSC. However, if the transferred funds did not derive from LSC, then the entity that received non-LSC funds was subject to the federal restrictions of an LSC recipient only insofar as it used the transferred funds. The new rule has eliminated this regulation on transfers of non-LSC funds, so that non-LSC funds can be transferred without the use of the funds being subject to any federal restrictions. *See* Ex. 3 at 3 (§ 1610.7, as amended effective today).

17. To the best of my knowledge, since the new restrictions became effective, LSC has not considered the application of the interrelated organization policy or the funds transfer policy to any of the named plaintiffs in this action.

18. I understand that a federal district court in Hawaii has recently ruled that the plaintiffs in a litigation filed there have a fair likelihood of establishing that LSC's previous interrelated organizations and transfer of funds policies unconstitutionally restrict recipient entities from engaging in certain activities. I understand that the essence of the court's decision was that LSC's previous policy was more restrictive than the policies adopted by the Department of Health and Human Services ("HHS") that were construed by the Supreme Court in *Rust*. Thus, the district court held that recipient organizations did not have sufficient freedom to express themselves through "alternative channels" not subject to federal restrictions. *Legal Aid Society of Hawaii* v. *LSC*, Civ. No. 97-00032 (*LASH*), slip op. at 23-30 (annexed hereto as Exhibit 5).

19. I respectfully submit that the court in Hawaii misconstrued LSC's previous policies. For example, the court ruled that "although the LSC regulations do

not explicitly forbid the overlap of employees, the broad definition of interrelatedness, in practice, serves to prevent one organization from having the same personnel of another." *LASH*, slip op. at 27. In fact, the previous policy provided that the "[e]xtent and pattern of any overlap of officers, directors, or other managers among organizations" was one out of eight factors that LSC would consider. Ex. 4 at 2-3. But if a recipient and a non-recipient organization had common staff who were not officers, directors, or managers, this commonality was not even a factor that LSC considered in determining control. Thus, LSC consistently applied the policy to permit non-interrelated organizations to share part-time staff without either organization being deemed to be under the "control" of the other.

20. I understand that the district court in Hawaii also relied on the fact that the HHS regulations construed by the Supreme Court in *Rust* permitted a recipient to "operate" separate projects not subject to federal restrictions, as long as those projects were "physically and financially separate" from the federally funded programs. In the Hawaii court's view, LSC's previous interrelatedness policy did not permit a recipient to "operate" another entity without subjecting the latter to the federal restrictions since such a relationship would have constituted "control" under the policy. *LASH*, slip op. at 27-29. The new rule that became effective today, which is discussed above at ¶¶ 9-13, was promulgated to address this concern.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 14, 1997.

/s/ JOHN A. TULL
JOHN A. TULL

[Emblem omitted]

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(202) 336-8800 Fax (202) 336-8959

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MEMORANDUM

To: Program Directors

From: John A. Tull, Director
Office of Program Evaluation,
Analysis & Review

Subject: Applicability of Restrictions to Interrelated Organizations

Date: December 11, 1995

The impending adoption of significant new restrictions on the range of permitted activities for LSC-funded programs and the extension of these restrictions to all funds received by these grantees has led to the exploration in state planning processes and elsewhere of various options to allow the representation of clients on restricted matters with non-LSC funds. Such representation by organizations that do not receive LSC funds directly or by sub-grant is, of course, legitimate. However, if the non-LSC organization is so

closely related to an LSC funded grantee that the two are deemed to be "interrelated organizations," all LSC restrictions will extend to both organizations.

Based on a GAO Report, dated August 22, 1985,[1] the 1986 LSC Audit and Accounting Guide, in Section 1-7, adopted a definition of and rules concerning "interrelated organizations". The standard set forth in the 1986 Audit Guide will determine when LSC will treat entities that are related to LSC recipients as interrelated organizations for purposes of determining if LSC restrictions apply to that organization. The provision in its entirety is as follows:

"1-7 INTERRELATED ORGANIZATIONS

For a recipient that controls or is controlled by another organization, it is presumed that combined financial statements are more meaningful than separate statements and are usually necessary for a fair presentation in conformity with generally accepted accounted principles. Control means the direct or indirect ability to (a) determine the direction of management and policies; or (b) influence the management or policies of another organization to the extent that an arm's length transaction may not be achieved. Control is a question of fact and must be determined by the overall circumstances of the relationship between organizations. Important facts relevant to this determination are:

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[1] GAO Report B-202116, August 22, 1985, entitled "The Establishment of Alternative Corporations by Selected Legal Services Corporation Grant Recipients."

(a) Extent and pattern of any overlap of officers, directors, or other managers among organizations;

(b) Contractual and financial relationships (especially in terms of the proportion of a possibly controlled organization's funds or resources that are provided by the controlling organization);

(c) History of relationships among the organizations (e.g. the fact that one organization provided initial funding and named initial directors of another would be a relevant fact; as would facts relating to decision-making on policies or transactions of mutual interest; actual control of particular decisions);

(d) Close identity of interest;

(e) One organization has become a mere conduit, "incorporated pocketbook," or "straw" party for another whether or not there was an attempt to work an injustice or promote a fraud;

(f) Funds are solicited by a separate entity in the name of and with the expressed or implicit approval of the recipient and substantially all of the funds solicited are intended by the contributor or are otherwise required to be transferred to the recipient or used at its discretion or direction;

(g) A recipient transfers resources to another entity that holds these resources for the benefit of the recipient; and,

(h) A recipient assigns functions to an entity whose funding is primarily derived from sources other than public contributions.

These facts and all relevant facts must be carefully weighed in each situation to determine whether control exists; if there is a basis for a reasonable doubt as to whether control exists, that basis should be disclosed by the recipient. There is a presumption that an ongoing relationship between a recipient and a bar association does not constitute an interrelationship as contemplated in this section.

If one organization controls another but the financial statements are not combined, the facts of the relationship shall be disclosed along with a statement as to the reasons why combined financial statements were not presented and the financial statements of controlling or controlled organizations shall be included. If financial statements are combined, the facts of the relationship shall be disclosed.

Funds held by an organization which controls, is controlled by, or is subject to common control with, a recipient or subrecipient are subject to the same restrictions as if the funds were held by recipient or subrecipient." (emphasis added)

Regardless of whether a recipient has chosen to be subject to the 1981 or the 1986 Audit and Accounting Guide,[2] LSC will consider the funds of interrelated organizations to be subject to all the restrictions on the use of non-LSC funds that would apply to the recipient, even if the interrelated organization does not formally receive any LSC funds. The basis for this policy is that

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[2] While the LSC Board has adopted a new 1995 Audit Guide, it does not supersede this portion of the 1986 Audit and Accounting Guide.

the presence of effective control indicates that LSC funds are being used for the interrelated organization's operations even though the formal accounts may not show this clearly.

A determination as to whether "control" is present such that an organization is actually an interrelated organization, or whether the two organizations are subject to common control, must be based on whether such control in fact exists, considering the totality of the circumstances. It is a factual test, not a numerical one. Thus, the presence or absence of any one or more of these factors is not determinative.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

No. 97 CV 00182 (FB)

CARMEN VELAZQUEZ, ET AL., PLAINTIFFS

against

LEGAL SERVICES CORPORATION, ET AL., DEFENDANTS

ANSWER

Defendant, Legal Services Corporation ("LSC"), by its attorneys, Kronish, Lieb, Weiner & Hellman LLP, answers the Amended Class Action Complaint (the "Complaint") as follows:

1. Denies the allegations in ¶ 1 of the Complaint, except admits that plaintiffs purport to sue on the grounds stated therein and refers the Court to Public Laws 104-134 and 104-208 for their complete contents.

2. Denies the allegations in ¶ 2 of the Complaint, except admits that plaintiffs purport to sue on the grounds stated therein.

3. Denies the allegations in ¶ 3 of the Complaint, except admits that LSC has notified recipients of LSC funding of the requirements of Pub. L. 104-208 and of the recipients' obligation to adhere to those limitations as a condition of continued funding.

4. Denies the allegations in ¶ 4 as they relate to 1995, and denies knowledge and information sufficient to form a belief as to truth of the allegations in ¶ 4 of the Complaint as they relate to 1996.

5. Denies knowledge and information sufficient to form a belief as to truth of the allegations in ¶ 5 of the Complaint, except admits that it has received reports from recipients of LSC funding indicating their compliance with the requirements of Pub. L. 104-208.

6. Denies the allegations in ¶ 6 of the Complaint, except admits that the Complaint purports to invoke the jurisdiction and venue provisions of the statutes cited therein.

7. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in the first paragraph in ¶ 7 of the Complaint.

(a) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(a) of the Complaint.

(b) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(b) of the Complaint.

(c) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(c) of the Complaint, except admits that MFY Legal Services receives funding from LSC through Legal Services of New York ("LSNY").

(d) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(d) of the Complaint.

(e) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(e) of the Complaint, except admits that Farmworkers Legal Services of New York, Inc. ("FLSNY") has elected to forego LSC funding.

(f) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶7(f) of the Complaint.

8. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶ 8 of the Complaint, except admits that FLSNY has in the past received funds from LSC, and in 1996, ceased accepting such funds.

9. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in the first paragraph in ¶ 9 of the Complaint.

(a) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(a) of the Complaint, except admits that Bronx Legal Services receives funding from LSC through LSNY.

(b) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(b) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(c) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(c) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(d) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(d) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(e) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(e) of the Complaint, except admits that Bronx Legal Services receives funding from LSC through LSNY.

(f) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(f) of the Complaint, except admits that MFY Legal Services receives funding from LSC through LSNY.

(g) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶9(g) of the Complaint.

10. Denies knowledge and information sufficient to form a belief as to the truth of the allegations in the first paragraph in ¶ 10 of the Complaint.

(a) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶ 10(a) of the Complaint, except admits that Legal Services for the Elderly receives funding from LSC through LSNY.

(b)-(g) Denies knowledge and information sufficient to form a belief as to the truth of the allegations in ¶¶ 10(b)-(g) of the Complaint.

11. Denies the allegations in ¶ 11 of the Complaint to the extent they purport to describe LSC's responsibilities and refers to the Court to the Legal Services Corporation Act of 1974, as amended, for its complete contents, and admits the remaining allegations in ¶ 11 of the Complaint.

12. Denies the allegations in the last sentence in ¶ 12 of the Complaint and states they contain legal conclusions to which no response is required, and denies knowledge and information sufficient to form a belief as to the truth of the remaining allegations in ¶ 12 of the Complaint, except admits that LSNY is a nonprofit corporation which receives funds from LSC and distributes them to grantees.

13. Denies the allegations in ¶ 13 of the Complaint, except admits the plaintiffs identified in ¶ 13 purport to bring this action individually and as a class action.

14. Denies the allegations in ¶ 14 of the Complaint, except admits FLSNY purports to bring this action individually and as a class action.

15. Denies the allegations in ¶ 15 of the Complaint, except admits the plaintiffs identified in ¶ 15 purport to bring this action individually and as a class action.

16. Denies the allegations in ¶ 16 of the Complaint, except admits that the plaintiffs identified in ¶ 16

purport to bring this action individually and as a class action.

17. Denies the allegations in ¶ 17 of the Complaint and states they contain legal conclusions to which no response is required.

18. Denies the allegations in ¶ 18 of the Complaint except admits that Public Law 104-134 was signed into law on April 26, 1996 and states that Public Law 104-208 became effective on October 1, 1996, and refers the Court to these laws for their complete contents.

19. Denies the allegations in ¶ 19 of the Complaint and refers the Court to Public Law 104-134 for its complete contents.

20. Denies the allegations in ¶ 20 of the Complaint except admits that LSC issued rules implementing Public Laws 104-134 and 104-208, and refers the Court to those rules for their complete contents.

21. Denies that any constitutional rights have been impaired and denies knowledge and information sufficient to form a belief as to the truth of the remaining allegations in ¶ 21.

22. Denies the allegations in ¶ 22 of the Complaint.

23. Denies the allegations in ¶ 23 of the Complaint.

24. Denies the allegations in ¶ 24 of the Complaint.

25. Denies the allegations in ¶ 25 of the Complaint.

26. Denies the allegations in ¶ 26 of the Complaint.

27. Denies the allegations in ¶ 27 of the Complaint.

28. Denies the allegations in ¶ 28 of the Complaint.

29. Denies the allegations in ¶ 29 of the Complaint.

30. Denies the allegations in ¶ 30 of the Complaint.

31. Denies the allegation in ¶ 31 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches, acquiescence, and/or estoppel.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs lack standing to seek injunctive relief.

Dated: New York, New York
March 19, 1997

KRONISH, LIEB, WEINER & HELLMAN LLP

By: /s/ ALAN LEVINE/BY SAW
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May 22, 1997

BY HAND DELIVERY

Honorable Frederic Block
United States District Court,
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Velazquez et al. v. Legal Services Corp., et al.,
97 CV 00182 (FB)

Dear Judge Block:

We write on behalf of defendant Legal Services Corporation ("LSC") to advise the Court that, since oral argument in this matter, LSC has made material changes to its regulations concerning "interrelated organizations" and "program integrity." Yesterday, the

revised final regulation was published in the Federal Register. A copy of the regulation, which will supersede the interim regulation that was in effect when the parties briefed and argued plaintiffs' motion for a preliminary injunction, is attached for the Court's convenience. For the reasons set forth below, we believe these changes adequately address the concerns raised by the plaintiffs in this case and the comments received by LSC during the notice and comment period. We are, of course, available to make any additional submission the Court may require on these issues.

As illustrated by the following chart, the "separation" requirements of the final regulation's "program integrity" test are identical to the Department of Health and Human Services' ("HHS") regulation approved by the Supreme Court in *Rust*:

New LSC Rules (47 C.F.R. 1610.8(a)(3))	Rules Upheld in Rust (42 C.F.R. 59.9)[1]
Factors relevant to this determination [of objective integrity and independence] shall include but will not be limited to:	Factors relevant to this determination [of objective integrity and independence] shall include (but are not limited to):
(i) The existence of separate personnel;	(c) The existence of separate personnel;
(ii) The existence of separate accounting and timekeeping records;	(a) The existence of separate accounting records;

[1] The order of subsections has been changed to facilitate comparison.

(iii) The degree of separation from facilities in which prohibited activities occur, and the extent of such prohibited activities; and	(b) The degree of separation from facilities (e.g., treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; and
(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.	(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

The new rule reflects several changes made in response to comments received during the notice period, including the elimination of any distinctions that existed between LSC's and HHS's regulations which were the source of confusion and misinterpretation. For example, LSC eliminated its former test for determining whether two organizations were "interrelated." Under the new rule, the primary issue is whether the non-LSC organization and the LSC grantee satisfy the "program integrity" test approved in *Rust*. Moreover, both the rule and preamble make clear that, like the program integrity test approved in *Rust* the separation factors will be applied on a case-by-case basis, and no one factor is dispositive.

In addition, plaintiffs previously argued that the LSC interim rule was more restrictive than the rule approved in *Rust* because the former required the LSC grantee and the non-LSC entity to have completely separate facilities, while the *Rust* regulations con-

sidered the "degree" of separation between the funded and unfunded facilities. Pl. Reply Br. at 9-10. This issue was also the subject of colloquy during the oral argument on March 24. To eliminate any potential confusion as to this issue, the final LSC rule has been revised to mirror the language in *Rust*; thus, under both rules, the question is the "degree" of separation. (*See above* Table, lines (iii) and (b)).

Finally, plaintiffs argued that the interim rule was overly restrictive because it required that LSC funds not "directly or indirectly" subsidize restricted activities. Pl. Reply Br. at 12. LSC also received comments expressing similar concerns. LSC has revised the rule to require only that LSC funds "do not subsidize restricted activities." 42 CFR 1610.8(a)(2). Moreover, in the preamble to the rule, LSC has clarified that "subsidy" does not include a situation in which a party pays fair market value for a shared facility.

Respectfully yours,

/s/ ALAN LEVINE
ALAN LEVINE

Enclosure

cc: Burt Neuborne, Esq. (by hand)
Peter M. Fishbein, Esq. (by hand)
Jeffrey S. Markowitz, Esq. (by telecopier)

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[other firm addresses omitted]

September 22, 1997

VIA HAND DELIVERY

The Honorable Frederic Block
United States District Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Velazquez, et al. v. Legal Services Corporation, et al., 97 CV 182 (FB)

Your Honor:

I am writing to call to your attention an important event affecting plaintiffs' motion for a preliminary injunction, dated January 27, 1997, pending before Your Honor.

On August 12, 1997, Legal Services for New York City ("LSNY") (previously voluntarily dismissed as a defendant, without prejudice, from this action) submitted to defendant Legal Services Corporation ("LSC") a proposed plan of operation for an affiliate corporation of Queens Legal Services Corporation ("QLSC") (a recipient of LSC funding, but a non-party to this action) pursuant to 45 C.F.R. 1610.[1] Under the proposed plan, the affiliate, utilizing non-LSC funds, would engage in activities prohibited to recipients of LSC funds. By letter dated September 10, 1997 to LSNY, John A. Tull, Director of LSC's Office of Program Operations, concluded that the proposed plan does not satisfy the "objective integrity and independence required by 45 C.F.R. 1610.8 from organizations that engage in restricted activities."[2]

One of LSC's arguments in opposition to plaintiffs' motion was that the motion was "premature," and, as a "facial" challenge to the statute and regulations at issue, must be denied if there were any conceivable constitutional interpretation of them. At the March 24 oral argument on plaintiffs' motion, counsel for LSC argued that LSC "ought to be put to the test of interpreting their regulations with respect to their grantees, to show whether or not this is as treacherous as Your Honor is suggesting." (Transcript at 18-19.) *See also* Defendants' Supplemental Memorandum of Law, dated March 21, 1997, at 3-4. LSC has now promulgated a definitive interpretation of its regulations which can be

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[1] A copy of the Request for Approval of Non-LSC Affiliate Relationship is attached as Exhibit A hereto.

[2] A copy of Mr. Tull's September 10, 1997 letter is attached as Exhibit B hereto.

adjudicated as a concrete case rather than a facial challenge.[3]

Moreover, the interpretation of the regulations as reflected in the rejection of QLSC's proposed plan, is plainly unconstitutional. QLSC's proposed plan makes clear that "QLSC-II [the affiliated entity] will not receive any LSC funds through any source. In addition, careful accounting and apportionment of expenses will ensure that the non-subsidization requirement of § 1610.8(a)(2) is met." Through the maintenance of "complete and accurate time records" all salaries and expenses will be allocated to ensure that only non-LSC funds subsidize restricted activity.

Mr. Tull's letter does not challenge the efficacy of these accounting procedures, and LSC's rejection of the proposal is not based on the position that in fact LSC funds will subsidize restricted activities. Rather, the basis for LSC's rejection is solely that, even though there will be no actual subsidy, there would be "confusion and misunderstanding about QLSC's involvement with restricted activities." In other words, the proposal is rejected because it would create the perception—even though untrue—that LSC funds were subsidizing restricted activity. Thus, Mr. Tull's letter states that the "bookkeeping separation between the organizations [i.e., the accounting procedures which would insure no subsidy in fact] is insufficient to avoid the public perception that restricted activities are being conducted by QLSC staff out of QLSC offices."

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[3] Although QLSC is not a party, LSC's interpretation obviously affects the rights of the named plaintiffs.

There are two reasons why this application of the regulations should be enjoined. First, it is factually incorrect. The proposal makes clear that in every instance where an attorney is representing QLSC-II in performing restricted services, that activity will be clearly identified by letterhead, litigation backs, oral statements and other appropriate means as being conducted by an entity which is not funded in any way by LSC. Since the restricted activities are actions to be taken before a court, administrative agency or legislative body, such identification is clearly sufficient to avoid any public perception that LSC funds are being used. (See my letter to the court dated June 5, 1997, pp. 2-3).[4]

Second, since there is no subsidy in fact, the possibility of a public perception to the contrary cannot justify the government prohibiting plaintiffs from engaging in constitutionally protected activities. Unlike the Title X program at issue in *Rust*, where concern was raised that a medial counselor may be "perceived" as acting as the government's "mouthpiece" for restricted activity (*i.e.*, abortion counseling), the attorneys in the instant case are often adverse to the government, and their activity, reaching the "heart" of the First Amendment, cannot be restricted. See Plaintiffs' Reply Memorandum of Law, dated March 21, 1997, at 2-7.

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[4] LSC's concern that under the QLSC proposed plan the "corporations share what is essentially the same name (*i.e.*, QLSC and QLSC-II)" can be readily addressed by QLSC-II adding to any papers filed, business cards (and/or signage) the parenthetical "(non-LSC funded)", or the name of the affiliated entity can be changed.

Oral argument on plaintiffs' January 27, 1997 preiminary injunction motion was held on March 24, 1997. In the meantime, final new regulations have been approved and a proposed plan for creating an affiliate entity has been concretely rejected by LSC pursuant to 45 C.F.R. 1610. Indeed, other legal service fund recipients are ready, willing and able to establish similar affiliate entities to service the indigent individuals who so desperately require legal representation to vindicate their rights in court. Plaintiffs, as well as such entities and other individuals, eagerly await this Court's decision.

Respectfully,

/s/ PETER M. FISHBEIN
PETER M. FISHBEIN

cc: Alan Levine, Esq. (via hand delivery)
Jeffrey S. Markowitz, Esq.
(via facsimile and federal express)

[Exhibit A to Sept. 22, 1997 letter
from Fishbein to court]

REQUEST FOR APPROVAL OF
NON-LSC AFFILIATE RELATIONSHIP

I. Background

Queens Legal Services Corporation ("QLSC"), a not-for-profit corporation organized under the laws of the State of New York, and a provider of legal services for the poor in the County of Queens, New York, hereby applies to Legal Services Corporation ("LSC") for approval of the affiliation of QLSC with a second corporation, Queens Legal Services Corporation II ("QLSC-II"), a not-for-profit corporation organized under the laws of the State of New York, which will use non-LSC funds to provide legal services restricted by Pub. L. 104-208.

In order to represent clients to the fullest extent permitted under the Constitution and in accordance with LSC regulations, QLSC has established a separate affiliated corporation for the purpose of engaging in restricted activities without the use of LSC funds. On May 7, 1997 the Board of Directors of QLSC adopted a resolution creating QLSC-II to engage in such activity. QLSC-II has been incorporated, has sources of non-LSC funding and is ready to commence operations immediately. Therefore, pursuant to LSC's policy of reviewing contemplated relationships upon request, as stated in 62 Fed. Reg. 27695, 27698 (May 21, 1997), QLSC hereby seeks confirmation from LSC that this proposed affiliate structure, as set forth below, com-

plies with the regulations set forth in 45 C.F.R. Part 1610 and any other applicable LSC regulations.

II. Operations

QLSC proposes the following operating arrangements with QLSC-II, so as to permit QLSC to continue to receive LSC funding and to permit QLSC-II to engage in legal services activities otherwise restricted under Pub. L. 104-208, without reducing QLSC's eligibility for LSC funding. QLSC will continue to receive LSC funds (either directly or through Legal Services for New York City, Inc.) and will not use those funds for legal services activities restricted by Pub. L. 104-208. QLSC-II will receive funds only from sources other than LSC; these sources may include, among others, IOLA, state and local governments, foundations and private donors. QLSC-II also may receive such non-LSC funds through QLSC. QLSC will not engage in any activity restricted by Pub. L. 104-208, while QLSC-II will engage in such activities, and may also engage in non-restricted activities. QLSC and QLSC-II will operate out of shared office space, and will share library facilities, office equipment, and office support services. QLSC and QLSC-II may share personnel, including, but not limited to, Project Directors, litigation directors, supervising attorneys, attorneys, paralegals, secretaries and other support staff, while some personnel may work for only one corporation or the other.

A. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(1) because the two organizations are legally separate entities.

The proposed relationship complies with the requirements of § 1610.8(a)(1) because, as indicated above, QLSC-II is a legally separate entity from QLSC.

B. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(2) because QLSC-II will receive no transfer of LSC funds, and LSC funds will not subsidize restricted activities.

As indicated above, QLSC-II will not receive any LSC funds through any source. In addition, careful accounting and apportionment of expenses will ensure that the non-subsidization requirement of § 1610.8(a)(2) is met. In the case of shared attorneys and paralegals, each entity will pay the proportion of salaries and benefits that are allocable to that entity, which will be calculated retrospectively on a monthly basis, based on time spent by the employee working for that entity. All other common or shared financial expenditures, including salaries of non-legal personnel, rent, library expenses, phone bills, utilities, supplies and office equipment expenses will be divided between QLSC and QLSC-II on a pro-rata basis (the "pro-rata figure"). The "pro-rata figure" will be calculated, retrospectively, on a monthly basis, as a ratio between attorney and paralegal time spent on QLSC matters and QLSC-II matters.

Each attorney and paralegal at QLSC and QLSC-II will maintain complete and accurate time records of the work they perform for each corporation. At the end of

each fiscal year, beginning upon the date of this application, the pro-rata figure will be calculated from these time records and all common and shared expenses and costs for QLSC and QLSC-II will be divided in accordance with that figure. This will ensure that for each fiscal year, LSC funds do not subsidize activities restricted by Pub. L. 104-208.

C. The proposed relationship complies with 45 C.F.R. § 1610.8(a)(3) because QLSC will be physically and financially separate from QLSC-II.

In compliance with § 1610.8(a)(3), QLSC and QLSC-II will maintain sufficient physical and financial separation to ensure that QLSC is not identified with restricted activities. Although QLSC and QLSC-II may share a common reception area, the separate corporations will be distinguishable through signage stating: "Queens Legal Services Corporation" and "Queens Legal Services Corporation II." Once an attorney meeting with a potential client foresees the reasonable likelihood that an activity restricted by Pub. L. 104-208 may be undertaken, the attorney shall advise the potential client that their matter will be handled by the non-LSC funded QLSC-II. If the attorney is only employed by QLSC, the attorney shall direct the client to a QLSC-II attorney.

In addition, there will be clear identification of the entity that is acting in any given case, through the use of separate and distinct business cards, letterhead, litigation backs and other means of identification. For example, any court filing will be made with a litigation back indicating which entity is filing the document. Similarly, at all court appearances, depositions or meet-

ings with opposing counsel or other parties, similar identification will be presented. Finally, if any attorney wishes to engage in lobbying efforts or administrative or legislative activity restricted by Pub. L. 104-208, the attorney shall identify himself or herself as an employee of "Queens Legal Services Corporation II" and present a business card or other identification to that effect.

These procedures provide for physical and financial separation as required by 45 C.F.R. § 1610.8(a)(3). The activities restricted by Pub. L. 104-208 essentially involve representation of clients in judicial or administrative proceedings or appearances before legislative bodies. Thus, the proposed procedures—which require that every paper filed and every appearance by an attorney involving a restricted activity will identify that the client is being represented by QLSC-II, not QLSC—are entirely sufficient in themselves to ensure that QLSC is not identified with the restricted activity. It will be apparent to the courts and agencies before which QLSC-II practices, the legislative bodies before which it appears, its clients and the public that QLSC is not engaging in, financing or endorsing the activities of QLSC-II.

[Exhibit B to Sept. 22, 1997 letter
from Fishbein to court]

[Emblem omitted]
LEGAL SERVICES CORPORATION
750 1st St., NE, 11th FL, Washington, D.C. 20002-4250
(202) 336-8800 Fax (202) 336-8959

[other letterhead material omitted]

September 10, 1997

H. Richard Schumacher, Esq.
Chairperson, Board of Directors
Legal Services for New York City
350 Broadway, 6th Floor
New York, NY 10013-9998

Re: Recipient No. 233100

Dear Mr. Schumacher:

I am writing in response to your letter of August 12, 1997, presenting a proposed plan of operation for an affiliate corporation of your subgrantee Queens Legal Services Corporation. I appreciate your interest in determining whether such an arrangement would be permissible under 45 C.F.R. 1610. For the reasons that follow, we conclude that the plan does not meet the requirements of the regulation.

As you know, 45 C.F.R. 1610 was adopted to implement Congressional restrictions on the use of non-LSC funds and to assure that no LSC-funded entity shall engage in restricted activity.[1] Under this regulation, an LSC recipient cannot itself engage in such activities, transfer LSC funds to another organization which engages in restricted activity, or use LSC funds to subsidize the restricted activity of another organization.

Recipients may transfer *non*-LSC funds to another organization which engages in restricted activity if, and only if, the other organization is a legally separate entity and the LSC recipient maintains objective integrity and independence from it.

To meet the objective integrity and independence test, a recipient must be organized so it is *physically and financially separate* from the other organization. Mere bookkeeping separation is insufficient. To determine whether there is sufficient physical and financial separation, the following factors, among others, will be considered:

- existence of separate personnel;
- existence of separate accounting and timekeeping records;
- degree of separation from facilities in which restricted activities occur, and the extent of such activities; and

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[1] A list of the restricted activities can be found at 45 C.F.R. 1610.2(a) and (b). They include, among other things, lobbying, participation in class actions, representation of prisoners, and claiming, or collecting and retaining attorneys' fees.

- the extent to which signs and other forms of identification which distinguish the recipient from the other organization are present.

The presence or absence of any one or more factors is not determinative. Each situation is viewed on a case-by-case, totality of the circumstances basis.

The Queens proposal clearly fails this test. Although Queens Legal Services Corporation II ("QLSC-II") is a legally separate entity from Queens Legal Services Corporation ("QLSC"), that is practically all that is separate. As the proposal states, not only will the corporations share what is essentially the same name, but QLSC and QLSC-II also

> will operate out of shared office space, and will share library facilities, office equipment, and office support services. QLSC and QLSC-II may share personnel, including but not limited to, Project Directors, litigation directors, supervising attorneys, attorneys, paralegals, secretaries and other support staff, while some personnel may work for only one corporation or the other.

The corporations will share a common reception area, and it appears that clients will be directed to common offices for appointments with attorneys who work for both corporations. The method of apportioning expenses retrospectively (monthly in some instances, at the end of the fiscal year in others) indicates common financial and timekeeping systems as well.

The fact that there may be separate signs, business cards, letterhead, litigation backup and other means of

identification does not satisfy the separateness requirement. As proposed, the two corporations are so completely intertwined that identification of QLSC and QLSC-II's restricted activities would be inevitable, as would confusion and misunderstanding about QLSC's involvement with restricted activities. What amounts to little more than bookkeeping separation between the organizations is insufficient to avoid the public perception that restricted activities are being conducted by QLSC staff out of QLSC offices. Under such circumstances, QLSC does not have the requisite objective integrity and independence required by 45 C.F.R. 1610.8 from organizations that engage in restricted activities.

I hope this letter provides you with the guidance you need. If you have further questions, feel free to contact Anh Tu at (202) 336-8946.

Sincerely,

/s/ JOHN A. TULL
JOHN A. TULL, Director
Office of Program Operations

cc: Dale Steven Johnson, Esq.
Joseph Farber, Esq.
Arnold S. Cohen, Esq.

[seal omitted]

U.S. Department of Justice
Civil Division
Federal Programs Branch
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September 25, 1997

VIA OVERNIGHT DELIVERY

Hon. Frederic Block
United States District Judge
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Carmen Velazquez, et al. v. Legal Services Corporation, et al., USDC E.D.N.Y., Civil Action No. CV 97 00182 (FB)

Your Honor:

In Peter M. Fishbein's letter of September 22, 1997, he discusses an event unrelated to the above-referenced lawsuit affecting an entity which is not a party to the lawsuit. I write to make a single point:

Nothing in Mr. Fishbein's letter affects or alters the inquiry before the Court.

Plaintiffs' challenge to the restrictions on Legal Services Corporation ("LSC") funds continues to be a *facial* challenge. Accordingly, plaintiffs' burden remains to demonstrate that there are not circumstances under which the restrictions could be applied without infringing constitutional rights. Mr. Fishbein's letter does not address that burden.

If the non-party entity to which Mr. Fishbein refers, which appears to have made no effort to comply with the physical separation requirements of the LSC regulations, disagrees with LSC's determination, it has a number of options available to it. Those options include bringing an as applied challenge in an appropriate forum.

Respectfully submitted,

/s/ JEFFREY S. MARKOWITZ
JEFFREY S. MARKOWITZ
Trial Attorney

cc: Alan Levine
Peter M. Fishbein
Burt Neuborne

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September 26, 1997

BY HAND DELIVERY

Honorable Frederic Block
United States District Court,
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Velazquez et al. v. Legal Services Corp., et al.,
97 CV 00182 (FB)

Dear Judge Block:

We write on behalf of defendant Legal Services Corporation ("LSC") to respond to plaintiffs' letter to the Court dated September 22, 1997.

Plaintiffs mistakenly believe that LSC's disapproval under its program integrity regulations of a proposal

for a non-LSC funded entity to engage in restricted activities using the same personnel, offices and support services as an LSC funded entity advances their position in this case. To the contrary, plaintiffs' attempt to inject this proposal into this case (a) reflects their refusal to come to grips with the Supreme Court's ruling in *Rust v. Sullivan*, 500 U.S. 171, 188 (1991), that the desire to "avoid creating the appearance that the Government is supporting" activities Congress decided not to support is a valid one and (b) completely ignores the principle underlying the regulations, *i.e.*, that mere bookkeeping separation is insufficient to insure that the two entities have the requisite "objective integrity and independence." 45 C.F.R. § 1610.8.

As explained in greater detail by Mr. Tull in his letter to LSNY, no attempt whatsoever was made to address the concerns reflected in the regulations. The two entities would work out of the same offices. They would share Project Directors, attorneys, paralegals, secretaries and other staff. They would use the same facilities and office support services. Indeed, even the choice of names (Queens Legal Services Corporation and Queens Legal Services Corporation II) underscores the near-identity of the two units. With the two entities sharing *everything*, the identification of an LSC funded entity with restricted activities would be unavoidable and their independence virtually non-existent. This is precisely what the program integrity requirements here, like the identical ones approved in *Rust*, were designed to prevent.

We also note that LSNY is not a plaintiff in this action. The fact remains that no plaintiff has attempted to comply with the program integrity regulations. The Court is thus still presented with a facial challenge to LSC's regulations, and therefore, to be entitled to relief, plaintiffs must establish that there is no set of facts under which the regulations could be applied in a constitutional manner. For the reasons set forth in our previous submissions, plaintiffs cannot meet this burden, and their request for a preliminary injunction should be denied.

Respectfully yours,

/s/ ALAN LEVINE
ALAN LEVINE

cc: Burt Neuborne, Esq. (by hand)
Peter M. Fishbein, Esq. (by hand)
Jeffrey S. Markowitz, Esq. (by telecopier)